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BEFORE THE FEDERAL ELECTION COMMISSION
IN RE: MUR 7221, James L. Laurita, Jr.

May 5, 2017

Introduction

This submission is made to the Federal Election Commission ("FEC" or "Commission") on behalf of James L. Laurita, Jr. ("Respondent"). It responds to the Commission's finding in the above-captioned matter, dated March 20, 2017, that there is reason to believe Respondent "knowingly and willfully" violated 52 U.S.C. § 30122, and that contributions potentially exceeding $600,000 were unlawfully reimbursed.[1]

As acknowledged in Respondent's letter[2] to the Commission joining the *sua sponte* submission ("Mepco *Sua Sponte*") by the law firm Kirkland & Ellis on behalf of Mepco Holdings, LLC and its subsidiaries ("Mepco"), starting in March 2010, Mepco adopted the practice of paying bonuses to Mepco executives so those executives could afford to make political contributions to various federal and state candidates. The last of these bonuses appears to have been paid in April 2013, after which severe financial conditions required that the practice be discontinued. In September 2013, when Mepco was in the course of Chapter 11 bankruptcy proceedings, Respondent was informed that the discontinued practice had been unlawful.[3]

[1] This submission is timely filed pursuant to an extension granted by the Office of the General Counsel.
[2] *See* Letter from William Farah to Mark Shonkwiler and Jin Lee (Sept. 24, 2014).
[3] It was not until Kirkland & Ellis lawyers were reviewing Mepco's compensation plan in the course of bankruptcy proceedings that the payments were questioned.

While Respondent introduced the practice, he was unaware - and the circumstances demonstrate had no reason to know – that paying bonuses to compensate employees who volunteered to make political contributions was unlawful. As explained more fully herein, the practice was conducted openly, and there was never any attempt to conceal or disguise the payments from Mepco's owners, executives, legal counsel[4] or the various accountants and financial advisers retained to monitor Mepco's expenses and operations, including a restructuring firm that for more than a year was scrutinizing Mepco's books and records (including compensation and other expenses).

A "knowing and willful" violation of section 30122 requires that the "acts were committed with full knowledge of all the relevant facts and a recognition that the action is prohibited by law." FEC Factual and Legal Analysis, prepared by the Office of the General Counsel, p.9 (citations omitted) ("Factual & Legal Analysis"). The limited evidence cited in the Factual & Legal Analysis certainly does not support such a finding, and appears to be based entirely on erroneous presumptions and inferences drawn from a few emails that have been taken out of context.

It is particularly noteworthy that the Mepco *Sua Sponte* prepared by Kirkland & Ellis, which reflects interviews with numerous Mepco executives and an exhaustive review and analysis of potentially relevant Mepco emails and other documents and records, is conspicuously devoid of any evidence that Respondent either was aware the bonus payments were unlawful, or that he made any attempt to hide or conceal the practice.

The amount of political contributions reimbursed through Mepco bonuses also appears to be grossly overstated. In this regard, the Factual & Legal Analysis misstates that Respondent

[4] For a period of time between 2010 and 2013, Mepco maintained in-house legal counsel, but her responsibilities were limited largely to preparing and reviewing Mepco contracts, advising the company on environmental matters and coordinating legal issues with outside counsel.

admitted "he received reimbursement for making contributions," *id.* at p.8, and also incorrectly suggests that a bonus awarded to him in December 2012,[5] included funds reimbursing him for his political contributions. *Id.* at p.7. As demonstrated herein, the bonus that Respondent received in December 2012 was performance-based, board approved and paid in accordance with metrics set forth under the terms of his written employment by Mepco.

Finally, it is important for the Commission to be mindful of the extent of Respondent's cooperation in this matter. When Respondent was first informed that Mepco's bonus payments to executives for their political contributions was unlawful, he made no attempt to hide his own involvement or deny responsibility for introducing the practice. Rather, Respondent assisted in the internal investigation conducted by the law firm of Kirkland & Ellis, and he joined the Mepco *Sua Sponte.* Since the matter was initiated almost three and one-half years ago, Respondent has routinely agreed to no fewer than ten Commission requests for tolling agreements.

Respondent Did Not "Knowingly and Willfully" Violate Section 30122

Mepco is in the business of mining and selling bituminous coal. In 2007, Mepco was acquired by Longview Intermediate Holdings C, LLC ("Longview Holdings"), which was owned by GenPower Holdings, LP ("GenPower Holdings"). GenPower Holdings is a partnership owned by First Reserve Corp. ("First Reserve"), a private equity firm, and GenPower LLC. ("GenPower"), a developer of electrical generating plants. Longview Holdings also owns Longview Power, LLC ("Longview Power"), which owns and operates a coal-fired electric generating station that is supplied with coal by Mepco. Through common ownership, Longview Power is an affiliate of Mepco.

[5] An apparent typographical error contained in the Factual and Legal Analysis cited this date as December 28, 2010, but it has been acknowledged by the Office of the General Counsel that the correct date is December 28, 2012.

Following the acquisition of Mepco in 2007, Respondent retained a minority interest in Mepco which, by 2012, had been reduced to 7.8%, and continued to serve as its chief executive officer, but he answered to Longview Holdings' ultimate owners, namely First Reserve and GenPower (hereinafter referred to as the "GenPower Executive Team"). Through Longview Holdings, the GenPower Executive Team controlled Mepco's board and named its officers (including Respondent) and closely monitored Mepco's operations and finances.

After the 2008 presidential and congressional elections, the coal industry became increasingly alarmed by legislative and regulatory initiatives threatening its livelihood. In response, coal trade groups, state chambers of commerce, and industry executives urged greater political engagement, including political contributions to candidates who opposed these initiatives and who would be supportive of the coal industry. This message was related to Respondent by a number of coal executives, including members of the GenPower Executive Team who urged Respondent to encourage Mepco's executives to become more politically active and make regular contributions to candidates who were "pro coal."

While Respondent was sympathetic to the call for greater political engagement (he and his wife already made political contributions regularly to candidates and political committees), he also was aware that Mepco's executives were woefully undercompensated compared to their coal industry peers.[6] To address this problem, Respondent proposed that Mepco would offer bonuses to those Mepco executives who volunteered to make political contributions to "pro coal" candidates.

[6] This disparity was confirmed by a 2011 study conducted by the compensation and employee benefits management firm Solenture.

Contribution recommendations were related to Respondent and other Mepco executives by coal trade associations and industry executives, including members of the GenPower Executive Team. Respondent and the other Mepco executives, or a subset of them, would then discuss and evaluate them. Those executives who volunteered to contribute would receive a bonus, either in advance or after the fact, to offset the cost. Mepco executives were free to decline to contribute to a candidate, and did so on occasion.

The bonus payments were tracked and paid in the ordinary course of business. Other than the customary precautions taken to prevent company-wide dissemination of employee salaries, no attempt was made to hide or conceal the practice, and as the emails cited in the Factual & Legal Analysis indicate, there was no attempt to mischaracterize, misrepresent or otherwise disguise the payments or their purpose. The openness by which the contributions were made and bonuses paid is evidenced by the way in which information about the contributions and bonuses was communicated and maintained. For example, communications were uncoded and made using Mepco's regular email system, and executives' contributions and bonus reimbursements were all shown on detailed spreadsheets that were visible and readily available to Ernst & Young (the company's accountants), Alvarez and Marsal (restructuring consultants), and other financial experts retained from time to time by other vested parties for the purpose of auditing Mepco's finances (*e.g.*, FirstEnergy Corp., a large publicly-traded purchaser of Mepco's coal that had a coal supply agreement with Mepco in which the price was based on Mepco's costs and expenses, conducted an annual audit of Mepco's costs).

Respondent does not recall informing the GenPower Executive Team explicitly that Mepco executives were being paid bonuses when they volunteered to make political contributions, but he operated under the assumption they were aware of the practice and had no objections. This belief

was reasonable given the close monitoring of Mepco's expenses by the GenPower Executive Team through its various financial experts, including the Financial Officer of Mepco, Chris Stecher, who had been hired by First Reserve to monitor and report on Mepco's financial operations.

While Respondent did not have unilateral authority to increase the salaries of Mepco's executives, he was authorized to award them discretionary bonuses within certain limits. Respondent understood that Mepco's expenses and operations were being closely monitored by the GenPower Executive Team, so when no one objected to or even questioned the bonus payments, Respondent had no reason to suspect the practice was anything but lawful.

Indeed, starting in August of 2012, and continuing through September 2013, Mepco's finances (including employee compensation) were put under the daily financial microscope of the financial restructuring firm, Alvarez & Marsal, which had been engaged by the GenPower Executive Team to help with a financial restructuring and, ultimately, a bankruptcy filing for Longview and Mepco. During this time, Alvarez & Marsal maintained a daily staff of as many as six financial experts in Mepco's corporate office, who were assigned to pore over Mepco's expenses, operations and management practices. Yet at no time during this 13-month period did the restructuring firm's staff of financial experts ever question or raise any concerns about the bonuses being paid to Mepco's executives, the purposes for which were clearly documented in the emails, payroll records and other supporting documents and records corresponding to the payments.

Respondent does not implicate the GenPower Executive Team and its financial experts for the purpose of accusing them of any wrongdoing or to shift responsibility to them; rather, their apparent awareness and acquiescence is cited to demonstrate that (i) Mepco's practice of paying bonuses to those Mepco executives who volunteered to make contributions was conducted openly

and was widely-known, and (ii) the plausibility of Respondent's ignorance that the practice was unlawful.

At this point, it should also be noted that no Code of Conduct/Ethics was ever adopted for Mepco, and no campaign finance training, legal guidance or other materials were provided to its executives (including Respondent), even after they had been encouraged to make political contributions. While Mepco had in-house legal counsel part of the time during which the bonus program was in effect, her responsibilities consisted largely of preparing and reviewing contracts, advising Mepco on environmental law matters, and coordinating other legal issues with outside counsel; she had no expertise in campaign finance law, and no one ever asked her to consider the legality of paying bonuses to executives who volunteered to make political contributions.

Respondent had very limited personal knowledge of campaign finance law from his own experience of making political contributions to various federal and nonfederal candidates. He was aware that a corporation could not contribute directly to a federal candidate, and he also understood that federal law imposed limitations on the amount that could be contributed to federal candidates, but this was the extent of his actual knowledge.[7] As noted, Respondent has never received training or legal guidance on campaign finance law.

The Evidence Does Not Support Finding a "Knowing & Willful" Violation

The evidence offered in the Factual & Legal Analysis does not support a finding of a "knowing and willful" violation of section 30122. Quite to the contrary, the very openness with which Mepco paid the bonuses to its executives for making contributions undercuts what the

[7] The Factual & Legal Analysis seems to make much of one invitation to a fundraising event forwarded by email as an attachment by Respondent containing a legal notice appearing near the end in small print font indicating that contributions may not be reimbursed. As explained later herein, the invitation was prepared by the candidate's campaign committee, not Respondent, and the notice was one of several appearing in fine print as legal boiler-plate that would easily escape attention.

Factual & Legal Analysis identifies as justification for inferring Respondent's unlawful intent. *See id.* at p.9 ("a person's awareness that an action is prohibited may be inferred from 'the [person's] elaborate *scheme* for disguising their ... political contributions'") (citation omitted) (emphasis added).

Clearly there was no "scheme" to hide or disguise the bonuses paid to Mepco executives for making political contributions, and there is absolutely no direct evidence that Respondent was aware that the practice was unlawful. The Mepco *Sua Sponte* memorializing Kirkland & Ellis's internal investigation of the matter, and which reflects interviews with a number of Mepco executives, is devoid of any accusation or other direct evidence that Respondent was aware the bonus payments were unlawful until he was so informed in September 2013, after Kirkland & Ellis lawyers reviewed Mepco's executive compensation plan that same month and inquired about the bonuses.[8] Because Respondent and Mepco did not have the same interests at stake when the internal investigation was conducted, there was no incentive for Kirkland & Ellis to refrain from highlighting any evidence of Respondent's knowledge of wrongdoing in the Mepco *Sua Sponte*.

The Commission's statement that Respondent "was informed about prohibitions and limitations of the Act" is inconclusive at best and rests entirely on unwarranted inferences derived from just two emails. *See* Factual & Legal Analysis, p.10-11. The first email relied on by the Commission is from a Congressman to Respondent that attaches the FEC's Contribution Limits Chart for 2011-12.[9] However, the FEC Chart only reflects the federal limits on the amounts that

[8] At the time that Respondent was informed that the bonus payments were unlawful, it is Respondent's recollection that no bonuses had been paid to any Mepco executive for political contributions since April 2013, due to the severe financial conditions.

[9] *See* MEPCO_000002869-870.

may be contributed to federal candidates and political committees. Neither the chart nor the email reference, much less explain, the prohibition against reimbursing contributions.

The second email relied on by the Commission is a request for contributions sent by Respondent to a Mepco executive soliciting a contribution from the executive and his wife on behalf of Mark Critz for Congress. It includes an explanation that, if the executive agrees to make the contribution, his account will be adjusted accordingly by Mepco's treasurer/secretary. Attached to the email is an invitation to the event containing the following disclaimer in small print at the end: "[c]ontributions must be made from your own funds, and funds cannot be provided to you by another person or entity for the purpose of making this contribution."[10] Offering this as evidence to show Respondent's knowledge of the prohibition against reimbursing contributions is not probative because (i) the invitation was not prepared by Respondent, and (ii) the language appears in a reduced font size and is buried among several other legal disclaimers in boilerplate fashion that easily escape attention.

Like most individuals who co-host fundraising events for candidates, Respondent was supplied with the invitation by the candidate's campaign, and other than conducting a cursory review for the accuracy of the date, time and place of the event, and perhaps the names of the other co-hosts, Respondent had no reason to closely analyze the legal boilerplate appearing near the end in small font. As previously explained, Respondent understood from attending fundraising events for federal candidates that corporate checks were prohibited, but that was largely the extent of his understanding of the prohibition.[11]

[10] *See* MEPCO_00000119-121.

[11] A footnote cited in the Factual & Legal Analysis references an email between Respondent and other coal industry executives puzzling over whether and when limited liability companies (LLCs) could contribute to federal candidates. This is not probative, however, that Respondent knew that paying bonuses to executives who volunteered to make political contributions was unlawful. *See* MEPCO_00000066.

The Factual & Legal Analysis also appears to assume that, merely because Respondent had a history of making political contributions, he must have an intimate knowledge and understanding of federal campaign finance law, and in particular the scope and application of section 30122. Again, this is not a reasonable assumption. Many contributors, even those who frequently host political fundraising events for candidates, are only aware of the most basic restrictions and requirements.

The Commission appears to have recognized this a number of years ago when it decided that the board of directors for the National Air Transportation Association ("NATA"), a national trade association of for-profit aviation businesses, should not be held liable when they acquiesced to a proposal by the then-executive director of NATA to reimburse NATA employees for their political contributions to the NATA PAC. *See* MUR 6889. In that matter, the NATA board consented to the practice on condition that the executive director obtain a favorable legal opinion, which he failed to do so. Nonetheless, one could reasonably argue that board members of a national trade association engaged in federal government relations and with a PAC active in federal elections for several years should have known, and did not need a legal opinion to assure them, that reimbursing contributions was unlawful. In that case, however, the FEC did not find a "knowing and willful" violation by the board. It should not do so in this case, either.

Respondent's 2012 Bonus Did Not Violate Section 30122

The Factual & Legal Analysis incorrectly finds that a $660,000 bonus paid to Respondent in December 2012 constituted reimbursement of as much as $267,750 in political contributions made by Respondent and his wife. Furthermore, the Factual & Legal Analysis inexplicably states that Respondent admitted "he received reimbursement for making contributions." *Id.* at p.8. This statement is patently false. Respondent's recollection is that the $660,000 bonus he received in

December 2012 was performance-based, approved by the GenPower Executive Team, and paid in accordance with the terms of his written employment agreement, which set forth specific financial goals and metrics for his bonuses.

When Mepco was acquired in 2007, Respondent was retained as its president and chief executive officer and entered into a written employment agreement with the company. *See* Employment Agreement with Mepco, dated December 13, 2007 ("Employment Agreement") **(Tab A)**. The Employment Agreement provided for Respondent to receive a $250,000 base salary with bonuses to be awarded if Mepco met certain performance goals. These goals were tied to Mepco's earnings before interest, tax, depreciation and amortization ("EBITDA"). Under the Employment Agreement, Respondent would receive a bonus equal to 100% of his base salary if Mepco reached its target EBITDA. If Mepco exceeded its target EBITDA, Respondent's bonus would increase incrementally (*e.g.*, 110% of target EBITDA would result in a bonus equal to 110% of Respondent's base salary). *Id.* at Schedule I ("Bonuses").

In January 2011, Longview Power's financial condition had deteriorated to a point that it required refinancing. In order to secure the necessary funding, all of Mepco's assets had to be pledged for collateral. This pledge required Respondent's consent. Respondent consented to the pledge, but only on condition that he receive an increase in compensation so it would be more commensurate with that of his industry peers and to recognize the extraordinary risk the pledge represented to his equity in Mepco. Later that year, to accommodate the condition Respondent had attached to his consent to the pledge, Respondent and Mepco agreed to modify his Employment Agreement to provide for a $600,000 base salary, but it also lowered his target bonus from 100% to 50% of his $600,000 base salary. *See* Letter of Intent and Term Sheet along with Longview Intermediate Holdings B, LLC Unanimous Written Consent of the Board of Managers

("Modified Employment Agreement") **(Tab B)**. Thus, if Mepco met its target EBITDA, Respondent would receive 50% of his base salary, and if Mepco exceeded its target EBITDA, Respondent's bonus would increase incrementally from that amount.

Mepco was extremely profitable in 2011, and Respondent believes it exceeded its target EBITDA, but the GenPower Executive Team refused to award him a bonus for 2011, even though he was contractually entitled to it, because Longview Power (Mepco's affiliate) continued to suffer financial difficulties. As 2012 neared its end, Respondent was determined not to let another year pass without receiving his bonus, for 2012 and 2011. Respondent was particularly concerned that Longview Power's severe financial condition, which had only worsened, would lead to bankruptcy and make it virtually impossible for him to collect the bonus he was contractually due for 2011 and would soon be due for 2012. Therefore, that December, Respondent pushed hard to receive both bonuses. This included reminding the GenPower Executive Team of Mepco's financial success, the extraordinarily long hours he had devoted to both Mepco and Longview Power, and the value of his political and legislative efforts made on behalf of the company, which included meeting with various state officials to obtain permits benefitting Longview Power and Mepco as well as the personal costs he had incurred in making political contributions. It is in this context that Respondent recalls asking his assistant to collect information about his past political contributions, so he could reference them when he advocated for the bonuses he was otherwise entitled to receive.

On December 28, 2012, Respondent received a bonus payment for $660,000. Respondent believes this amount accurately reflects the amount he was contractually entitled to receive under the terms of his Modified Employment Agreement. More specifically, Respondent recalls that Mepco had exceeded its target EBITDA for 2011 and 2012 to an extent that he was entitled to

receive 110% of his target bonus for those years. Since Respondent's target bonus was 50% of his $600,000 base salary (*i.e.*, $300,000), and he was entitled to 110% percent of his target bonus ($330,000), his combined bonus for 2011 and 2012 totaled $660,000. *See* Modified Employment Agreement, Exhibit A ("Annual Cash Bonus").[12]

The Factual & Legal Analysis does not tie Respondent's bonus to any corresponding political contributions, but instead states merely that Respondent "was awarded a bonus of $660,000 on December 28, 201[2],[13] *which appears to include the funds reimbursing him for his contributions*." Factual & Legal Analysis, p. 7 (emphasis added). Respondent contends that his bonus was awarded in accordance with the terms of a written employment agreement that tied the amount to performance-based metrics, and that it is incorrect to conclude that his bonus included a reimbursement for political contributions. At most, Respondent's political contributions were used by him to demonstrate the unconditional personal sacrifice he had made in order to encourage the GenPower Executive Team to honor its obligation to him.

The Factual & Legal Analysis states that Mepco executives were "reimbursed for federal political contributions in an amount potentially exceeding $600,000. *Id.* at p.1. An accompanying chart estimates this figure to total $631,543.52. *Id.* at p.4. But since Respondent was not reimbursed for his political contributions, the figure is overstated by as much as $267,750 and should be reduced accordingly to no greater than $363,793.52.

[12] This provision states that Respondent's annual bonus should be determined under the same terms provided under the 2007 Employment Agreement "but, effective commencing with the 2011 fiscal year, with a target annual bonus of 50% of Base Salary [and mutually agreed upon revisions to the schedule of the bonus earned]." *Also see*, Employment Agreement, Schedule I ("Bonuses").

[13] An apparent typographical error in the Factual and Legal Analysis cited the date to be December 28, 2010, but it has been acknowledged by the Office of the General Counsel that the correct date is December 28, 2012.

Request for Pre-Probable Cause Conciliation

In view of Respondent's full cooperation in this matter, including the additional information supplied in this response, we request, pursuant to 11 C.F.R. 111.18(d), that the Commission enter into negotiations directed toward reaching a pre-probable cause conciliation agreement with Respondent.

Respectfully submitted by:

William J. Farah

William J. Farah

(Attachments)